

**STAFF DRAFT**

**ADVISORY OPINION 08-XX**

Interpretation of T.C.A. §§ 3-6-301 (15) and (17) with regard to whether advising clients on strategies for communicating with officials in the legislative or executive branch in order to affect legislative or administrative action constitutes lobbying.

Requestor: Robert Gowan, Southern Strategy Group

**QUESTION**

Whether the Ethics Reform Act (“Act”) requires an employee of a lobbying firm to register as a lobbyist if the employee advises clients on strategies to influence legislative or administrative action, which legislative or executive officials with whom the client should communicate, when to communicate with these officials, how to communicate with them, and what the content of the communication should be?

**ANSWER**

Yes. Under Tenn. Code Ann. §§ 3-6-301(15) and (17) and 3-6-302(a) a person who communicates, directly or indirectly with officials in the legislative branch or executive branch for the purpose of influencing any legislative or administrative action, and receives compensation for his or her communications, is engaged in “lobbying” and must register as a lobbyist.

**FACTS**

The original request asked for an opinion on whether the following activity falls within the statutory definition of lobbying: “Advising a client or lobbyist on a strategy to influence legislative or administrative action.” No facts were provided with the request. The Tennessee Ethics Commission (“Commission”) staff asked Mr. Gowan to supply facts to permit the Commission to give a meaningful opinion.<sup>1</sup> Mr. Gowan responded he has, “suggested that a

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<sup>1</sup> The statute authorizing the Commission to issue advisory opinions provides, in pertinent part, that “[w]ith respect to an issue addressed in an advisory opinion, any person who conforms that person’s behavior to the requirements of the advisory opinion may rely upon the advisory opinion without threat of sanction.” Tenn. Code Ann. § 3-6-107(3). If no facts are provided, the Commission cannot assure Mr. Gowan which of his behaviors are protected from sanction and which are not.

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client or lobbyist contact a legislator or executive official,” and has “suggested officials with whom a client or lobbyist could choose to communicate, as well as suggesting the means and timing of the communication.”

Mr. Gowan is an employee of Southern Strategy Group (“The Group”). According to the Group’s website, it is “the South’s largest lobbying firm,” employing thirty-eight (38) lobbyists in fifteen (15) offices throughout the United States.<sup>2</sup> The Group’s lobbyists “are drawn from the top ranks of government and the political process.” “They also bring with them close relationships to powerful public officials fostered over many years.” The Group opened its Nashville office on December 5, 2007. The announcement of the opening of the new office stated, “Robert Gowan and Meredith Sullivan, both from the top ranks of the Bredesen Administration, will be lobbyists in the new Nashville office.” Mr. Gowan is quoted on the website as saying that the Group uses “a new approach to lobbying where clients receive multi-state services without losing the hometown touch.”

Notwithstanding the website’s statement that Mr. Gowan will be a lobbyist in the new Nashville office, Mr. Gowan takes the position that he is not engaging in lobbying in Tennessee.<sup>3</sup> He is not registered as a lobbyist with the Commission.

## **ANALYSIS**

The Act requires a person engaged in lobbying to register as a lobbyist.<sup>4</sup> A lobbyist is defined by the Act as, “any person who engages in lobbying for compensation.” As Mr. Gowan is being compensated for his activities, the question becomes, what does it mean to lobby and, under the facts presented, is Mr. Gowan engaged in lobbying?

The Act defines “lobbying” as, “to communicate, directly or *indirectly*, with any official in the legislative branch or executive branch for the purpose of influencing legislative or administrative action.” T.C.A. § 3-6-301(15)(emphasis added). Mr. Gowan clearly advises clients for the purpose of influencing legislative or administrative action. What is, then, the meaning of “communicate?”<sup>5</sup> In other words, is Mr. Gowan, in suggesting his client’s means and method of communication with an official, “communicating” as contemplated by the Act?

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<sup>2</sup> [www.sostrategy.com](http://www.sostrategy.com). (visited March 19, 2008).

<sup>3</sup> There is no disclaimer on the website to the effect that Mr. Gowan does not lobby in Tennessee. Nor is there any statement on the website that Mr. Gowan is not registered as a lobbyist in Tennessee. In fact, his Southern Strategies’ biography page is found at the following address: <http://www.sostrategy.com/lobbyists.php#14>. (visited March 19, 2008). Mr. Gowan’s suggestion that he is not a lobbyist within the meaning of the Act can be resolved if one assumes that Mr. Gowan engages only in lobbying as to persons other than executive and legislative branch officials of the state of Tennessee. Lobbying of local officials, or officials of other states, is not regulated by the Act.

<sup>4</sup> 3-6-302(b)(2). *See also* Advisory Opinion 06-01 (lobbyists have seven (7) days to register).

<sup>5</sup> According to Mr. Gowan, he doesn’t communicate with legislators or executive officials. He only offers “advice” regarding communications between his clients and these persons. The Commission thus assumes Mr. Gowan’s position at Southern Strategies does not include direct communication with officials in the legislative or executive branches for the purpose of influencing any legislative or administrative action.

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The Act specifically includes indirect communication within its definition of lobbying. However, the Act specifically defines neither “indirect” nor “communication.” To aid in defining “indirect” and “communication,” the Commission looks to plain and ordinary meaning of the statutory language.<sup>6</sup>

The natural and ordinary meaning of “communicate” is, “to have an interchange of ideas and information.”<sup>7</sup> In his employment, Mr. Gowan discusses and suggests the interchange of ideas and information between his clients and officials in the legislative or executive branches. He does not, however, do the exchanging in person, himself. The query is whether communicating to advise a client how to most effectively communicate with an official in the legislative or executive branch for the purpose of influencing legislative or executive action amounts to “indirect” communication with legislators in violation of the Act. To resolve this issue, it is important to consider the definition of “indirect” in the context of communication.

“Indirect” is not defined in the Act. One Tennessee court, faced with a similar situation, consulted the dictionary as follows:<sup>8</sup>

“Indirect” is not defined in *Black's*, but is defined in *Webster's* as “not direct: ... (1): deviating from a direct line or course: not proceeding straight from one point to another: proceeding obliquely or circuitously: roundabout.” *Id.* at 1151. Thus, Tenn. Code Ann. § 5-14-114 prohibits a county official from having any personally favorable interest in a county contract, regardless of whether that interest is direct or circuitous.

*State v. Whitehead*, 43 S.W.3d 921, 929 (Tenn.Crim.App. 2000) (dicta—statute held unconstitutional under equal protection clause).

Where the advice is being given for the purpose of influencing legislative or administrative action, advising a client how to communicate with an official in the executive branch or an official in the legislative branch, is indirect lobbying. In other words, Mr. Gowan is being compensated to interchange ideas and information with officials in the legislative or executive branches for the purpose of influencing legislative or administrative action, in a roundabout way. He is engaged in “lobbying” as contemplated by the Act, and must register with the Commission as a lobbyist.

Being paid by another to communicate for the purpose of influencing legislative action is lobbying, whether or not the lobbyist communicates directly with the legislator. In the seminal case of *United States v. Harriss*, the Supreme Court noted lobbying could be construed to

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<sup>6</sup> *Sallee v. Barrett*, 171 S.W.3d 822 (Tenn.2005)(discussing giving effect to legislative intent without unduly restricting or expanding legislation); *State v. Blackstock*, 19 S.W.3d 200, 210 (Tenn. 2000)(“legislative intent and purpose are to be ascertained primarily from the natural and ordinary meaning of the statutory language.”)

<sup>7</sup> *Webster's II New College Dictionary*, 233 (3<sup>rd</sup> ed. 2005).

<sup>8</sup> Other statutes do contain such a definition. E.g., Tenn. Code Ann. § 57-3-406 (indirect interest in sale of alcoholic beverages); Tenn. Code Ann. § 12-4-101(b) (indirect interest creating conflict of interest).

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include “artificially stimulated letter campaigns.” 347 U.S. 612, 620, 74 S.Ct. 808, 813 (1954)<sup>9</sup>. Similarly, the Washington Supreme Court concluded that such funded letter campaigns were indirect lobbying. *Young Am. for Freedom, Inc v. Gorton*, 522 P.2d 189, 190-192 (Wash. 1974).<sup>10</sup>

Mr. Gowan notes that his communications are not mandatory and some clients may not contact the officials suggested. The fact that some clients may not communicate with the suggested officials does not relieve Mr. Gowan from the registration requirement of Tenn. Code Ann. § 3-6-302(a). As stated in his clarification, “It is the client’s or lobbyist’s decision whether the advice . . . is used.”<sup>11</sup> While this may be true, it is absurd to assume a person whose purpose in communicating with a client is, “advising a client or lobbyist on a strategy to influence legislative or administrative action” has no clients who contact the suggested officials.<sup>12</sup>

A physician does not cease to be a physician if his patient declines advice to quit smoking. An attorney does not cease to be an attorney if her client refuses advice to close his illegal business.<sup>13</sup> Likewise, a lobbyist does not cease to be a lobbyist simply because his client declines to meet with a certain legislator or follow the means, timing, and method suggested.<sup>14</sup>

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<sup>9</sup> In order to avoid a constitutional issue, the court narrowly construed the Federal Regulation of Lobbying Act to regulate only “direct” lobbying activities. *Harriss*, 347 U.S. 612, 620-621, 74 S.Ct. 808, 813-814 (1954). The court noted that Congress intended broader regulation. *Id.* A footnote to the opinion cites Congressional findings regarding the activities of lobbyists. *Id.* at 621, 841, n10.

<sup>10</sup> *E.g., Minn. State Ethical Practices v. Nat’l Rifle Ass’n*, 761 F.2d 509, 510 (8<sup>th</sup> Cir. 1985)(upholding constitutionality of requirement that NRA executive director register as lobbyist for sending letters and mailers urging NRA members to contact their legislators in support of pending legislation),

<sup>11</sup> Electronic mail received from Mr. Gowan on February 15, 2008.

<sup>12</sup> *Wachovia Bank of N.C v. Johnson*, 26 S.W.3d 621, 624 (Tenn. Ct. App. 2000)(courts should presume the legislature did not intend an absurd result).

<sup>13</sup> *See United States v. Bloom*, 149 F.3d 649, 658 (7<sup>th</sup> Cir. 1998)(“If we can say, as a court, that a lawyer in the giving of advice for a fee, to a client as to how to complete an illegal transaction does not involve the lawyer bearing an interest, direct or indirect, in the transaction itself then we have provided a defense to chicanery and illegality.”). State statutes requiring disclosure of indirect lobbying not been found constitutionally overbroad. *Comm’n on Indep. Coll. and Univ. v. N.Y. Temp. State Comm’n on Regulation of Lobbying*, 534 F.Supp 489, 497 (N.D.C.N.Y 1982) (finding a lobbying disclosure statute was not overbroad even though it did reach indirect as well as direct lobbying activities). *Kimbell v. Hooper*, 665 A.2d 44, 47 (Vt. 1995)(finding state statute requiring disclosure of indirect lobbying activities not overbroad).

<sup>14</sup> *See also*, Advisory Opinion 06-01 (discussing lobbying as a profession).

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